IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 357 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HEIRS KANTILAL PURSHOTTAMDAS PATEL

Versus

DAHIBEN JAGDISH RATHOD

Appearance:

1. Second Appeal No. 357 of 1980

MR AJ PATEL for Petitioner No. 1-1/3

MR DD VYAS for Respondent No. 1-1/4

CORAM : MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 20/08/2002

ORAL JUDGEMENT

This Second Appeal arises from the judgement and decree dated 19.7.1980 passed by the learned Assistant Judge, Valsad at Navsari in Regular Civil Appeal No. 9 of 1978 whereby the learned Assistant Judge was pleased

to allow the appeal and set aside the judgement and decree passed by the learned Joint Civil Judge (Junior Division), Navsari dated 30.12.1977 in Regular Civil Suit no.3 of 1976. The facts of the case are that the plaintiff had filed the suit for the following reliefs:

"For declaration that the sale deed dated 29.10.1971 (exh.22), executed by the deceased Jagdishbhai Lallubhai Rathod, the husband of the plaintiff Dahiben and father of four minor children on whose behalf the plaintiff Dahiben had pursued the remedy in favour of the defendants, was in respect of the ancestral property of Undivided Hindu Family (HUF) and that the same was sold without any necessity and was not for the benefit of the estate and therefore, not binding to the minors. It was also prayed that the plaintiff, Dahiben had a charge over the property for maintenance and that the possession and share of the minors in the suit property be awarded."

2. The subject matter of the suit is the plot of land admeasuring about 1175 sq. ft. (109.28 sq. mts.) forming part of Survey No.37, Tika No.28, situated in the city of Navsari and a house standing there bearing Municipal Census No.378. The said property was sold by the deceased Jagdishbhai Lallubhai Rathod for a consideration of Rs.4994/-, to the defendants by a registered sale deed dated 29.10.1971. The plaintiff challenged the said sale deed, mainly on the ground that the deceased Jagdishbhai Lallubhai Rathod had no authority to execute the sale deed as the property was ancestral in character as the land bearing Survey No.37, Tika No.28 situated in the city of Navsari with superstructures thereon was owned and possessed by one Dahiben Keshavbhai (grand mother of late Jagdishbhai). After her death the said property was devolved upon Lallubhai Keshavbhai (father of Jagdishbhai). After the death of Lallubhai Keshavbhai it was inherited by his widow Deviben (mother of Jagdishbhai). Said Deviben died in the year 1968. After her death it was inherited by deceased Jagdishbhai Lallubhai. As is set out in the evidence an agreement to sell was executed on 25.6.1971. At that time a sum of Rs.251/-, was paid as Earnest Money. Thereafter, between 5.7.1971 to 14.10.1971 in instalments a sum of Rs.3325/- was paid by the defendants to deceased Jagdishbhai and finally on 29.10.1971, a registered sale deed was executed and payment of the remaining amount of Rs.2418/-, was made totalling to Rs.4994 as consideration for the property in question.

One of the glaring factors of this case is that the present plaintiff-- Dahiben Jagdish Rathod, who has filed the suit in her personal capacity and also as natural guardian and next friend of four minor children, was one of the witness to the said registered sale deed (exh.22). Said Jagdishbhai died on 28.1.1972. The widow Dahiben Jagdish Rathod did not take any steps except filing the present Regular Civil Suit No.3 of 1976. It is also on record that even after the death of her husband Jagdish Rathod, the plaintiff-- Dahiben used to borrow money from the defendants and as she did not repay the amount borrowed the defendants were constrained to file Small Cause Suit No.54 of 1975. It is also on record that there were some criminal complaints filed by the plaintiff against the family of the defendants. Said criminal cases were disposed of in the year 1976. No explanation has come forward on record as to why the plaintiff did not file any suit before the present suit was filed in the year 1976.

3. The suit was contested by the defendants by filing their written statement, exh.8A. The case of the defendants is that the deceased Jagdishbhai had sold the suit property to the defendants with the knowledge and consent of the present plaintiff, Dahiben. The other averments made in the plaint were denied. That the deceased was in need of money as he was not maintaining good health and he along with the plaintiff, Dahiben had to borrow money for their household expenses and were passing necessary writings as and when the money was borrowed. As the deceased had incurred debt for the household expenses, medical expenses and for payment of past debts incurred for the benefit of the family, the deceased and the plaintiff were in need of money and hence disposed of the property. In fact there are recitals in the sale deed itself to the effect that, 'the deceased and the plaintiff, Dahiben were not able to find any purchaser because there was no direct approach to the plot in question'. It was only thereafter that the plaintiff and her husband approached the defendants through one building contractor, named Natvar and described their dire necessities and requested defendants to purchase the suit property under any circumstances. The defendants after making inquiries and ascertaining the antecedents agreed to purchase the suit property. As stated hereinabove the suit property was purchased after entering into agreement to sell in June 1971 and thereafter, a registered sale deed in October 1971. It is also on record that thereafter the deceased succumbed to his ailment of heart disease in January 1972. The plaintiff-- Dahiben herself, had altered the sale deed as

a witness, still she did not do anything for long and filed the suit in the year 1976 only. In this appeal at one stage, the plea of limitation was also raised as the sale deed is dated 29.10.1971 and the suit for declaration of the sale to be invalid was filed in the year 1976. However, the same is not dealt as this appeal is decided in favour of the present appellants on other points.

4. The learned Civil Judge (Junior Division) found that the suit property was not ancestral, belonging to the Hindu Undivided Family (HUF) and therefore, the plaintiff Dahiben as well as minor children have no charge or vested interest in the same. The learned trial Judge was pleased to hold that the plaintiff had failed to prove that, 'there was no legal necessity to sell the suit property on behalf of the members of the joint family'. He also found that the deceased Jagdishbhai was not spending moneys for illegal or immoral purposes that there was no evidence to show that he had earned Rs.11,000/-, at the time of leaving his earlier job. The learned trial Judge was pleased to conclude that, 'the plaintiff was witness to the execution of the sale deed dated 29.10.1971 and the same is binding to the plaintiff as well as the minors according to law'. The learned Judge was pleased to award compensatory cost to the defendants while dismissing the suit.

5. The learned first appellate Judge was pleased to allow the appeal and set aside the judgement of the trial court. The learned first appellate Judge was pleased to declare the sale deed dated 29.10.1971 executed by deceased Jagdishbhai Lallubhai Rathod (exh.22) in respect of the suit property in favour of the defendants, as illegal and not binding to the plaintiff and set aside the same. The learned first appellate Judge was pleased to order that the defendants shall deliver vacant and peaceful possession of the suit property mentioned in the sale deed (exh.22), more particularly described as plot of the land admeasuring 1175 sq. ft. (109.28 sq. mts.) being part and parcel of Survey No.37, Tika No.28, situated in Purna society in the city of Navsari to the plaintiff. The learned first appellate Judge was pleased to declare that, 'the defendants have acquired undivided interest of the deceased Jagdishbhai Lallubhai in the suit property and that they are entitled to take proceedings to have that interest ascertained by partition' and for that purpose the learned first appellate Judge was pleased to stay the execution of the decree for a period of two months from the date of the judgement and decree; and if before the expiry of

that period, the defendants bring a suit for general partition against the plaintiffs, then the stay shall continue until disposal of the suit. However, if no such suit is brought within that period, then the stay of execution shall stand cancelled.

6. The matter was heard at length. The learned advocate Ms.Trusha Patel for Mr.A.J. Patel strenuously contended before the Court that the learned first appellate Judge has erred,

(i) in allowing the appeal, quashing and setting aside the judgement and decree of the trial court and declaring the sale to be invalid, and

(ii) in holding that the learned trial Judge has erred in considering the question of burden of proof and believing the deposition of the plaintiff without there being any supporting documentary evidence to the same.

7. The plaintiff had contended that the property was ancestral and that being so the deceased had no right or authority to sell the same, that there was no legal necessity to sell the property that there was sufficient income for the family to meet the expenses of the family, that the money received by way of consideration of this sale was squandered by the deceased for immoral or illegal purposes. For appreciation of the aforesaid submissions of the learned advocate, the deposition of the plaintiff, Dahiben at exh.27 is required to be kept in mind. It is the case of the plaintiff-- Dahiben that her husband was earning Rs.850/-, per month as driver in Mumbai. But then to allege that the husband was irresponsible and was not taking care of the family, she has stated that he was sending Rs.100 to Rs.200/-, twice a year. She then proceeds to depose that she was serving in a pre primary school and was getting Rs.90/-, per month as salary, she was also getting rental of Rs.160/-, per month from four tenants. The learned advocate while making her submissions contended that the learned first appellate Judge has believed the aforesaid averments without there being any supporting documentary evidence. Not only that the learned first appellate Judge has observed that,

"The trial court, inter alia, cast burden on the plaintiffs which is pointed out above was not proper. .."

8. The learned advocate submitted that even under elementary principles of law of evidence, when a party comes before the Court and pleads its case, it is for that party to substantiate the same by leading necessary documentary evidence, wherever it is available. In the present case, the plaintiff-- Dahiben, widow of the deceased Jagdishbhai has pleaded that her husband was serving as Driver in Mumbai and was drawing salary of Rs.850/-, per month, she could have produced some documentary evidence. The learned advocate submitted that, that is not all; what is more important is that when during her cross examination she was asked as to whether she will like to examine any person from that company, she refused to examine any such person.

9. The plaintiff, Dahiben has also deposed that she was working in a pre-primary school and was getting Rs.90/-, per month. In support of this contention also no documentary evidence is produced nor any person from such pre primary school is examined in support of her case. It is also the case of the plaintiff that she was having rental amount of Rs.160/-, per month from four tenants, to which also no documentary evidence is produced, nor any attempt is made to substantiate its case by examining any tenant. The learned first appellate Judge while appreciating the deposition of the plaintiff is pleased to observe that:

> ".. .. She has not been able to prove her say by documentary evidence, but only on that ground, it cannot be discarded, because her positive evidence is not disproved in any way by the defendants. .. .."

The observations of the learned first appellate Judge are unwarranted, inasmuch as the matters, which were pleaded by the plaintiff were required to be proved by the plaintiff by leading necessary documentary evidence, when the same were controverted by the defendants. The defendants having controverted the case of the plaintiff which the plaintiff had put forward a positive case, it could not have been negatively disproved by the defendants. It can only be positively proved by the plaintiffs. Thus, the observations of the learned first appellate Judge are not only unwarranted, but are misdirected. The learned first appellate Judge has then proceeded further to state that,

> ".. .. Continuous absence of her husband and the peculiar domestic circumstances must have

compelled to run her house with difficulty and naturally, she could not be in possession of such proofs and it cannot be insisted that she must be able to prove all these things only by a documentary evidence, because only the housewives can know the real income of the property and nobody else and there must be a limit to the nature of proof required in such circumstances. .. .."

10. The learned Judge has failed in appreciating an important aspect of the matter that so far as the proof is concerned, it is not necessary that only documentary evidence should have been produced in absence of such documentary evidence some supporting witness could have been examined by the plaintiff to substantiate its case, which otherwise remained only an oral word of the plaintiff. The case put forward by the plaintiff is that she was having sufficient income to meet with the expenses of the family and that there was no legal necessity for the deceased to sell the property. There is a specific attempt on the part of the plaintiff to state that though her husband was earning a handsome amount, he was not supporting the family because he used to spend that amount for illegal/ immoral purposes. There being a specific case, the learned first appellate Judge ought to have insisted for specific proof of the same. The learned trial Judge was right in not believing the case of the plaintiff relying on mere oral words of the plaintiff. The learned first appellate Judge for no valid reasons, accepted the deposition of the plaintiff in toto and came to the conclusion that there was no legal necessity on the part of the deceased to dispose of the suit property.

11. The learned advocate submitted that so far as the aspect of 'legal necessity' is concerned there are averments in the registered sale deed itself and there is no reason to disbelieve these averments more particularly when this deed is attested by the plaintiff-- Dahiben as a witness. The learned advocate placed reliance on the judgement of the Honourable the Supreme Court in the matter between Sree Iswar Gopal Jieu Thakur v. Pratapmal Bagaria & others, reported in A.I.R. (38) 1951 SC 214, wherein the Honourable the Supreme Court was pleased to hold that,

"It is well settled that if all the original parties to the transfer by a shebait and those who could have given evidence on the relevant points such as legal necessity have passed away a

recital consisting of the principal circumstances of the case assumes greater importance and cannot be lightly set aside."

12. In the present case this proposition of law is applicable in full force because the husband of the plaintiff-- Dahiben had executed a registered sale deed and the plaintiff herself is witness to that document. She has come forward to contend that there was no legal necessity for the husband to dispose of the property. The plaintiff has not supported her case with documentary evidence on any point, which could have been done, if she had so chosen and in the alternative at least she could have examined a supporting witness. The recitals in the document assumes greater importance and cannot be lightly set aside in such circumstances. On perusal of the document at exh.22 there are clear recitals about the 'legal necessity' and there is no reason to disbelieve those recitals, more so when the plaintiff is also not able to render any explanation as to why did she not take any action from 1972 to 1976. There is no reason why the plaintiff could have kept 'quite' on such an important issue. She is claiming maintenance from the property in question, she is claiming share of minor children in the property, she is praying for declaring the sale transaction to be invalid on account of there being no authority with the husband to sell that property.

13. The learned advocate also contended that from the conduct of the plaintiff and from the fact that the minor children who are born in 1960, 1962 (two of them) and 1966, have already become major and have not chosen to endorse the action of the plaitiff-the mother, the suit must fail. Besides that, another important aspect of the matter is that when the present appellants-- original defendants had paid the sale consideration amount, a bank account was opened and substantive amount was deposited in the said Bank account which was operated by the plaintiff-- Dahiben after the death of her husband. The defendants had examined one Ratilal Lallubhai Shah at exh.56 to prove that out of Rs.4994/-, a sum of Rs.3000/-, was deposited in the said Bank account and it was operated by the plaintiff-- Dahiben. That after the deceased executed the sale deed in question on 29.10.1971 he died on 28.1.1972 of heart ailment, a presumption could have been raised to the effect that he must have required that amount for medical treatment. It is also on record that after he left the services of Morarji & Co., Bombay, he joined the services of Hindustan Cloth Company. But then he had to proceed on sick leave. During that period of sick leave he passed away.

14. From the above discussion it is clear that except bare words of the plaintiff-- Dahiben, she has not placed any documentary evidence on the record of the case in support of her case. The learned trial Judge was right in holding that the plaintiff is not able to prove her case. It is no doubt clear that so far as the nature of the property is concerned, the learned trial Judge was wrong. The property which devolved from the ancestors there was hardly any reason to disbelieve the character of the property being ancestral property. But there was ample evidence on record to show that the deceased was not having any regular income, more particularly in the last days when he suffered heart ailment and in such circumstances normal course will be to dispose of the property to maintain the family and to get medical treatment.

15. In view of the aforesaid discussion it is held that the property was ancestral and the deceased had no absolute right to dispose of the ancestral property and as held by the learned first appellate Judge, the deceased had a limited right to dispose of the property only to the extent of his own share only but as it is on record of the case that besides the property under the registered sale deed, exh.22 admeasuring 1175 sq.ft. (109.28 sq.mts.) approximately, the plaintiff had 5000 sq.ft. of land also which is also an ancestral property, the total comes to 6175 sq.ft. in which the deceased had 1/5th share, which will be more than 1200 sq.ft. in any case; that being so, as the property sold is 1175 sq.ft., the sale in question cannot be invalidated on simple calculation.

16. In the result, this Second Appeal is allowed. The judgement and decree passed by the learned first appellate Judge is set aside to the extent it declares the sale deed dated 29.10.1971 executed by deceased Jagdishbai Lallubahi Rathod, exhibit 22 in respect of the suit property in favour of the defendants invalid. The sale deed dated 29.10.1971 is declared to be legal and valid. In view of that rest of the directions issued by the learned first appellate Judge are rendered unmeaningful and the same are quashed.

17. The cross objections are dismissed.

(Ravi R. Tripathi, J.)

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